

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----x
UNITED STATES OF AMERICA : Docket No. 06CR6009CJS
:
vs. :
:
MARIAN ASENOV PENEV :
Defendant :
-----x Status

Transcript of Proceedings
Before Honorable Charles J. Siragusa
United States District Judge

Friday
September 28, 2007
Rochester, New York
2:00 p.m.

A p p e a r a n c e s :

RICHARD RESNICK, ESQ.
TIFFANY LEE, ESQ.
Assistant United States Attorney
6200 Federal Building
Rochester, New York 14614

DONALD THOMPSON, ESQ.
16 West Main Street, Suite 243
Rochester, New York 14614
Attorney for Defendant

Reported By:

Karen J. Bush

Official Court Reporter

U.S. District Court - WDNY

(585) 613-4312

1 THE COURT: For the record, this is the matter of
2 the United States versus Marian Penev. You are Marian Penev?

3 THE DEFENDANT: Yes.

4 THE COURT: And you're appearing with your attorney
5 Mr. Thompson; is that correct?

6 THE DEFENDANT: Yes.

7 THE COURT: The Court notes the presence of Ms. Lee
8 on behalf of the Government. Mr. Penev, as I'm sure you are
9 now aware, an issue has come up with respect to the latest
10 presentence report that was filed. I know you've had an
11 opportunity to discuss this with Mr. Thompson, but essentially
12 what happened is on September 24th a revised presentence
13 investigation report was filed. As Mr. Thompson pointed out
14 in his communication of September 26th of 2007, under the law,
15 and, specifically federal law, I'm sure it doesn't mean
16 anything to you, the number, 18 U.S.C. Section 3552(d) clearly
17 requires that the presentence report that is filed be provided
18 to the defendant 10 days before sentencing unless that time
19 period is waived. Mr. Thompson's correspondence specifically
20 indicates that he will not waive it. We had a scheduling
21 conference yesterday. At that scheduling conference, the
22 Government asked Mr. Thompson either to waive the request
23 requirement and allow sentencing to proceed as scheduled on
24 the September 24th presentence report or waive -- waive is the
25 wrong word -- or essentially agree that the September 24th

1 presentence report could be withdrawn. If that was the case,
2 then sentencing would be based on the May 2007 presentence
3 report, that was the crux of our discussions yesterday. Mr.
4 Thompson indicated that he wanted an opportunity to discuss
5 with you what your position was. That's why we're here today.
6 And, Mr. Thompson, for you to report what the defense position
7 is.

8 MR. THOMPSON: Mr. Penev is not in position to make
9 a determination that he can consent to the waiver of the time
10 frame statutory time period or the withdrawal of the amended
11 PSR today, so I think we should pick another sentencing date.

12 THE COURT: Ms. Lee, I did indicate to Mr. Resnick,
13 I don't recall if you were present, but I thought I indicated
14 if there was additional law that anyone perhaps wanted to
15 provide to me.

16 MS. LEE: Unfortunately, your Honor, we could not
17 find any case law with respect to withdrawal of a presentence
18 report. I do note that the statute speaks of a report and it
19 doesn't say necessarily say any report, so I don't know.

20 THE COURT: I don't -- it talks about the report. I
21 want to go back because we discussed this yesterday. I tried
22 to research the issue. You're right, there is not much on it.
23 However, if you go to 18 U.S.C. Section 3552, I'm reading (d)
24 and I read it a number of times, but I'll read it again: "The
25 court shall assure that a report filed pursuant to this

1 section is disclosed to the defendant, the counsel for the
2 defendant and the attorney for the government at least 10 days
3 prior to the date set for sentencing." As it stands now, the
4 procedure utilized is that once sentencing occurs, the
5 presentence report on which sentencing is based is filed in
6 the clerk's office, by case law it's filed under seal, but
7 it's filed. So, as it stands now, Mr. Spogen, you can correct
8 me, that the report that you would be filing is the report of
9 September 24th; is that correct?

10 PROBATION: That's correct.

11 THE COURT: So, Ms. Lee, again, I'm certainly open
12 for guidance, but it does clearly appear from the plain
13 reading of the statute that that report, that the report that
14 is filed has to be provided to the defendant 10 days before
15 sentencing.

16 MS. LEE: It just seems such a -- just such a
17 hypertechnical matter, especially if this matter --
18 essentially when the only issue in the new report has to do
19 with restitution, which could have been provided in a letter,
20 and I think the parties agree that -- that with respect to the
21 May report, we're fine. We understand what the facts are
22 contained in that report and what we're saying is the
23 additional paragraph in the September 24th report is of no
24 substance.

25 THE COURT: You know, I'm not arguing with you. The

1 last thing as I said to Mr. Resnick that I want is to be back
2 here at some point in the future because we didn't follow the
3 law. I mean, the law seems to be pretty clear that the report
4 that's filed has to be -- and the report that is filed, unless
5 you can present me with some law that can say we can say
6 nevermind to the September 24th report.

7 MS. LEE: You know, it just seems to me, you know,
8 the sentencing, whatever is contained in the presentence
9 report, certainly affects the defendant, so it would seem to
10 me that he would have to show that he is prejudiced by being
11 sentenced on this report, which he had no notice of.

12 THE COURT: Do you have any law to that effect?

13 MS. LEE: No.

14 THE COURT: Well, there has got to be some law.
15 Again, I gave the Government a chance to research it. This is
16 a new position. You're saying forget a revised report, you're
17 saying in any report, it doesn't follow, you're saying if the
18 defendant can't invoke the 10-day limit, unless he shows that
19 he wasn't prejudiced. If I could take that argument to the
20 conclusion it means that the defendant has no objections to
21 the presentence report, let's forget the 11(c)(1)(C) context,
22 if you take your argument, it seems to be the logical
23 conclusion, and correct me if I'm wrong, what you're saying is
24 a defendant gets the presentence report two days before
25 sentencing, if he doesn't object to anything, then he can't

1 invoke this 10-day requirement because he is not saying he is
2 in any way prejudiced. And I don't think that is correct. I
3 recall reviewing some cases that talk about the fact that the
4 Defendant has to be given the presentence report and I didn't
5 think they tied it in to any objection. I have to admit, my
6 research focused on trying to find a revised presentence
7 report and I couldn't.

8 MS. LEE: And I think that's where our focus was,
9 too, but I'm just thinking about what the notice requirement
10 is supposed to satisfy, and it just seems to me it's supposed
11 to assure the defendant opportunity to address issues which
12 are certainly of a due process concern to the defendant being
13 his sentencing. So, but you're right, again, this is just a
14 theory, I'm just thinking about as I'm standing here, and I
15 don't have any case law at this point to articulate a
16 foundation for it, but it just seems to me that, for example,
17 if you know Mr. Thompson has an objection to the new September
18 report and if on the date of sentencing the Government says,
19 fine, you can disregard that paragraph, we're taking that
20 paragraph out of the equation, it's not even an issue, it's
21 not for your consideration because we agree that this has no
22 bearing on the sentencing in this case, then what you're left
23 with is the May report. You're left with exactly the same
24 position we would be in.

25 THE COURT: Well, the latest report, doesn't the

1 later report talk about restitution of \$8,000, May 24th (sic)
2 report mentions an \$8,000 -- or the September 24th report
3 mentions an \$8,000 restitution figure and the numbers that I
4 just got from the Government have it down to \$6,000 and don't
5 include the amount that should go to Excellus.

6 MS. LEE: But what we have here is the victim's
7 family is willing to say we're willing to live with the amount
8 as of May, I believe.

9 THE COURT: That's not what they're saying. You
10 know, the Government needs to get their act together. That is
11 not what they're saying. The May amount, according to Mr.
12 Spogen, was \$4,000.

13 PROBATION: \$3000 and something.

14 THE COURT: That is not what the Government is
15 saying. The Government is not saying that the victim's family
16 -- I don't know what the Government is saying. All I can say
17 the latest communication I got from the Government puts the
18 restitution at -- to the minor victim at \$4,275, which I don't
19 believe is accurate because it doesn't back out the amount
20 that was reimbursed by the New York State Crime Compensation
21 Board, so that figure should be reduced accurately by \$863.70,
22 and it sets a figure of \$2,363.70, which the Government
23 maintains should go to Excellus because --

24 MS. LEE: It just seems to me, your Honor, if Mr.
25 Spogen never filed the report, never filed this amendment and

1 what happened, the Government offers the Court and Defense
2 Counsel this letter to say this is where we're at in terms of
3 restitution, we're in the same place. The only difference is
4 because it's contained within the presentence report and it
5 just seems to me, you know, like --

6 THE COURT: So, again, I'm not arguing with what
7 you're saying, I'm just trying to interpret the law. Doesn't
8 the law say that report that is filed, the report that is
9 filed has to be provided 10 days before, isn't that what the
10 law says?

11 MS. LEE: The law says a report filed.

12 THE COURT: Well, and the only report that is going
13 to be filed is the one -- the only report that is going to be
14 filed is the one on September 24th, we don't file two reports,
15 right?

16 MS. LEE: That's correct, but, you know, again, your
17 Honor, I mean, I mean, the failure here -- I just feel like
18 the failure in this situation is the fact that this report was
19 filed, I mean --

20 THE COURT: It's not -- you're missing the whole
21 point, it's not filed yet. The way it works here, the way it
22 works is I'm provided with a report, upon which sentencing is
23 based. As you know, sometimes there is one report, sometimes
24 reports are revised. I have a revised report. The report
25 upon which I'm now basing -- would base sentencing is the

1 September 24th report. Once I sentence, that report is filed.
2 The way I read the statute, it says the report that is filed
3 has to be provided to the defendant 10 days before sentencing.
4 Am I reading the statute wrong?

5 MS. LEE: By your read then, if we agree that the
6 May report will be the report that is filed then --

7 THE COURT: You're right, and that is what I asked
8 the Government. Other than the emotional arguments, I mean is
9 there any -- I asked you, can you unilaterally withdraw? Can
10 a government unilaterally say we want probation to withdraw
11 the May 20 -- the September 24th report and sentence the
12 victim on -- excuse me -- and sentence the defendant on --

13 MS. LEE: On the May report, and that is what we're
14 saying. There is nothing in the statute prohibiting us from
15 saying file the May report.

16 THE COURT: Well, that's different than what Mr.
17 Resnick said yesterday. Yesterday Mr. Resnick, I thought, I
18 don't know if anyone was here, but my recollection is that he
19 said it comes down to whether or not Mr. Penev either would
20 waive the 10-day requirement as to the new presentence report
21 or consent to be sentenced on the old report. I think that is
22 what the Government said yesterday.

23 MS. LEE: Well, I think, though, that was prompted
24 by just this idea of can we just go back and agree to the May
25 report.

1 THE COURT: Let's stop. When you say agree, who's
2 got to agree?

3 MS. LEE: Well, that's the problem. I mean, the
4 statute doesn't give us a mechanism. It doesn't tell us,
5 well, in considering a report to be filed, you have to follow
6 these steps.

7 THE COURT: Come on. You don't usually choose a
8 report to be filed. Have you ever had a situation in the time
9 you've been in the U.S. Attorney's Office where it's been
10 nevermind this latest report, let's go back to an old report?

11 MS. LEE: Not in my experience.

12 THE COURT: Neither have I. And I understand it,
13 and believe me, the last thing I want is to inconvenience
14 anyone. I've scheduled this a long time and, you know, I've
15 allowed a long time for the sentencing. So, it's not -- it's
16 not because I want to adjourn it, I'm trying to follow what
17 the law says.

18 MS. LEE: Well, I don't think Mr. Resnick or I had
19 really thought it through in terms of what the filing process
20 is by way of the presentence report. You're correct, there is
21 no presentence report filed from the Government's perspective.
22 I think what prompted the discussion was that Mr. Resnick had
23 this realization, why don't we just go with the May report at
24 least from the May report --

25 THE COURT: You weren't here yesterday, were you?

1 MS. LEE: I was sitting in the back, your Honor.

2 THE COURT: You heard him say he suggested that and
3 you also heard him say before we left, I might be wrong, Mr.
4 Spogen was here, you know, other people were here, I thought
5 he said before we went that we put this on to determine
6 whether or not the defendant would agree to consent to be
7 sentenced on the May 24th report or the May 2007 report. I
8 thought that is why we put it on today. And I thought it was
9 the Government's position, that if he didn't consent or agree
10 to withdraw, I mean, otherwise, what does the Government say,
11 Mr. Spogen don't use that report, get rid of the latest
12 report? How else would not that be the report which is filed?
13 I mean, what -- under what mechanism would you just -- can the
14 Government just tell Mr. Spogen, don't use that report? Can
15 the Court just say, don't use it and is it another minor
16 thing, but it includes a recommendation about the cost of
17 what, Mr. Spogen?

18 MR. THOMPSON: Supervision.

19 MS. LEE: I think that is why, to be on the safe
20 side, procedurally, we were seeking consent from the defendant
21 in the issue.

22 THE COURT: It seems a little disingenuous. Would
23 you say then to be on the safe side we wanted to seek the
24 consent from the defendant, but now that we didn't seek it, we
25 don't want to be on the safe side anymore?

1 MS. LEE: No. Again, I don't believe that is fair
2 because, your Honor, we're just trying to say, you know, as
3 far as the parties concerned, we're ready. We were ready to
4 proceed based on the facts set out in the May report. We were
5 ready all the way up until the point that all the parties were
6 notified in September that there was going to be a revision in
7 the September report. And, you know, we don't believe that
8 the revisions in the September report are of the nature that
9 changed the substance of the May report and we believe that,
10 you know, that the defendant could proceed, we could proceed
11 based on positions we had on September 23rd.

12 THE COURT: It doesn't come -- we discussed this in
13 great length. If the defendant consents, that is not the
14 issue. Does he have to proceed or does the defendant have a
15 right, and, apparently, wants to exercise that right, that is
16 the issue I'm faced with. Does he have the right to say, no,
17 I didn't get my 10-day notice on the report that was going to
18 be filed, I didn't get the report that is going to be filed 10
19 days before sentence, therefore, it's my right to have that
20 report. I'm not waiving my right, therefore, you can't
21 sentence me as scheduled. That's -- I mean, that's the
22 question before the Court. And believe me, I'm entirely
23 cognizant, because Mr. Resnick said that several people from
24 the victim's family have made arrangements to come up,
25 apparently, he said had non-refundable tickets. I understand

1 that and I'm not insensitive to that, however, it's my
2 obligation to follow the law. And sometimes --

3 MS. LEE: Your Honor, we just -- our position is
4 yes, he has the right to 10-days notice for the report that is
5 going to be -

6 THE COURT: The report.

7 MS. LEE: The report that is going to be filed.

8 THE COURT: I read -- when I say the court is in
9 receipt of the presentence report as revised on September 24th
10 and if I'm relying on that report, which I think I have to, I
11 don't think I can say nevermind.

12 MS. LEE: But I guess it's which report are we
13 consenting to and, obviously, the reliance now is now on the
14 latest report, the September report.

15 THE COURT: And so I'm on the September report.

16 MS. LEE: Okay.

17 THE COURT: And I don't see that I have any choice
18 and it appears clear, again, we don't find the unique
19 situation we have here and I'm sure the Government has looked
20 at case law where if a defendant objects that he didn't get
21 the report 10-days before, the Circuit remands it back.

22 MS. LEE: And we have seen that.

23 THE COURT: That is what the Court is trying to
24 avoid, a situation where the Circuit says it's pretty clear
25 this is what the statute says, you were aware of that district

1 judge, you knew you didn't have -- he didn't have it 10 days
2 before, we've told you. Now, could you make the same
3 arguments you're making in front of me? Maybe. You're
4 essentially saying no harm no foul, but I point out maybe you
5 could make the same argument if at sentencing on a presentence
6 report I said, well, you didn't get it 10 days before, tell me
7 why you need it 10 days before, you got it nine days before,
8 why do you need the extra day, are you going to make some
9 objections? I don't think that would make a difference.

10 MS. LEE: I think the statute is deficient because
11 it doesn't provide for -- what are technical errors? What is
12 a J&C? You have seven days to correct a minor technical
13 figure, if there is -- restitution is off, there is a 10-day
14 period to allow for that type of mistake, it doesn't make
15 sense, that is all we're dealing with, this September -- a
16 very technical.

17 THE COURT: I should point out the September report,
18 as we know, contains a reference to a letter that is not in
19 the May report that was solicited by the Government. I think
20 it's unfair -- I mean, it's a letter by the, if I remember
21 right, by the certified social worker that talks about not
22 just -- I think that is where we get the figure of \$8000, but
23 talks about the need for future services. And what you seem
24 to be saying is, okay, if we withdraw anything that the
25 defendant objects to in a presentence report, then there is no

1 harm and the 10-day period can be waived. I don't think that
2 is the case. I'm not --

3 MS. LEE: I'm not saying that the 10-day period be
4 waived. I'm saying, no harm. We're back in the May report,
5 he got the 10-day notice on the May report.

6 THE COURT: Have you found any law -- forget the
7 context of the revised presentence report -- any law that
8 supports that position. Let me give you the scenario you're
9 giving the Court. You come to sentence, the defense says I
10 didn't get this report 10 days before and I'm objecting to
11 this enhancement, all right. We'll withdraw that. Do you
12 have any law that would say, okay, and I guess that is what
13 I'm asking and that is what I asked yesterday.

14 MS. LEE: No, it's just -- I don't think it's a
15 situation that's litigated because at the point we say we
16 withdraw, they're fine with it, they're not going to say there
17 is the 10-day violation because they got what they wanted
18 terms of the withdrawal of whatever the issue is. You know,
19 but, your Honor --

20 THE COURT: We'll take out -- we'll go back to the
21 May restitution and take out the latest letter that we got, I
22 mean, when you say take it out, I don't know what you mean,
23 it's in the report. What do I do, just forget it? I mean, I
24 don't know what you want me to do other than ignore the
25 statute because somehow I'm saying, okay, it's a technical

1 violation and even though the statute doesn't provide for --
2 doesn't mention prejudice or doesn't mention technical
3 violations, you should go ahead. I mean, believe me, I
4 thought long and hard about it. As I said, I don't know
5 whether it would ever come back. Obviously, the Government at
6 least, has entertained the possibility that it could come
7 back, otherwise you wouldn't use the phrase the safer course
8 would be to try and get the defendant to consent. Safer
9 course implies that there is a problem, there is a potential
10 problem if he doesn't consent.

11 In any event, it's regrettable, however, the law is
12 clear, the law that I read doesn't contain any provision for
13 what we've discussed as no harm, no foul so the Court
14 determines it has no choice but to reschedule.

15 MS. LEE: Well, the Government is going to provide
16 you the dates that we've been provided by the victim's family
17 in terms of the dates that they --

18 THE COURT: And I said yesterday, I would
19 accommodate both sides on those dates, even if it meant -- I
20 think I mentioned to both sides, the Court has scheduled for
21 two lengthy trials, I'll try and accommodate everyone as best
22 I can. I will break the trials, as I understand this is
23 important.

24 MR. THOMPSON: Can I get my calendar from the
25 Marshals?

1 THE COURT: The last thing I said, what the Court
2 wants is this to come back. Especially since it's an
3 11(c)(1)(C).

4 MR. THOMPSON: I'm going to get a break in trials,
5 too. Judge, maybe I'll need your assistance with that.

6 THE COURT: All right.

7 MR. THOMPSON: Depending on the date we pick.

8 THE COURT: All right. We'll pick a date that is
9 agreeable. We can do it any time after the --

10 MS. LEE: Your Honor, these are the dates I've been
11 provided -- Wednesday, October 24th, all day, Thursday and
12 Friday either October 25th and 26th, mornings only.

13 THE COURT: Let's go with the 24th. Mr. Thompson,
14 how does that look?

15 MR. THOMPSON: I'm in the middle of a state court
16 trial, but I'm sure if you make a request, they'll let me out
17 for the day.

18 THE COURT: Who is the judge?

19 MR. THOMPSON: Valentino.

20 THE COURT: I'll call Judge Valentino. To the
21 extent I'm in trial, I'll schedule it to accommodate everyone.
22 We will put this on down then for 2 o'clock. All right? Does
23 that work for everyone?

24 MR. THOMPSON: Fine, Judge.

25 MS. LEE: That's fine.

1 THE COURT: We'll put it down for 2 o'clock and I'll
2 rework my schedule, put it down for 2 o'clock. I say 2
3 o'clock, that should give everyone time, give you time to like
4 work on your trial with people, people are coming from out of
5 town, that should give them more time to come in. All right.
6 We'll reschedule this, and to be clear, I will be sentencing
7 on the presentence report filed as revised on September 24th.

8 MS. LEE: Thank you.

9 THE COURT: Thank you very much.

10 REPORTER CERTIFICATION

11

12 I, Karen J. Bush, Official Court Reporter for the United
13 States District Court, Western District of New York, duly
14 appointed pursuant to provisions of Title 28 United States
15 Code Section 753, do hereby certify that I did report in
16 stenotype machine shorthand the proceedings held in the
17 above-entitled matter;

18 Further that the foregoing transcript is a true and
19 accurate transcription of my said stenographic notes taken at
20 the time and place hereinbefore set forth.

21

22 Dated March 24, 2009

23 At Rochester, New York

24

s\ Karen J. Bush

25
